No. 80-1083

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In the Supreme Court of the United States

OCTOBER TERM, 1980

BARNEY'S CLUB, INC., ET AL. PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioners violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the union without having a reasonably based good-faith doubt of the union's majority support among their employees.

2. Whether the Board properly concluded that petitioners violated Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from engaging in union solicitation during nonworking time on petitioners' premises.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 623 F. 2d 571. The decision and orders of the Board (Pet. App. 42-132) are reported at 227 N.L.R.B. 414 (*Barney's*) and 230 N.L.R.B. 275 (*Sparks Nugget*).

JURISDICTION

The judgment of the court of appeals in *Barney's* was entered on August 18, 1980 (Pet. App. 37-39); the judgment in *Sparks* was entered on September 12, 1980 (Pet. App. 28-31). Justice Rehnquist extended the time for filing a petition for a writ of certiorari to January 2, 1981 in *Barney's* and to January 4, 1981 in *Sparks*. The petition for a writ of certiorari was filed on January 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 158(a), are set out at Pet. 3.

STATEMENT

1. Petitioner Barney's Club operates a casino, bar and restaurant in Stateline, Nevada (Pet. App. 45). Petitioner Sparks Nugget operates a hotel, casino, bar and restaurant in Sparks, Nevada (*id.* at 99). Since 1960, Sparks Nugget has been a member of the Reno Employers Council (the "Association"). In 1965, Barney's Club also joined the Association (*id.* at 46, 100). The Association represents its members in collective bargaining with various unions including Hotel, Motel, Resturant Employees and Bartenders International Union, AFL-CIO (the "Union") (*id.* at 45-46). When petitioners joined the Association, they became parties to the then existing collective bargaining agreement between the Union and the Association. In doing so, they recognized the Union as the representative of their bar and culinary employees (*id.* at 46, 100).

In August and December 1974, Barney's Club and Sparks Nugget respectively withdrew their memberships from the Association (Pet. App. 47, 100). Thereafter, petitioners refused the Union's request to enter into collective bargaining on an individual basis. Petitioners claimed they had a genuine doubt that the Union represented an uncoerced majority of their employees (*id.* at 47, 60, 101).

Since July 1974, Sparks Nugget and Barney's Club have posted no-solicitation rules at their respective casinos. Their rules, which are virtually identical, state in pertinent part that "[s]olicitation on company premises by employees after employees[']' shift has been completed is prohibited" (Pet. App. 47-48, 103-104).

2. Upon unfair labor practice charges filed by the Union, the Board concluded that petitioners had violated Section

8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union on an individual basis without having a reasonably based good-faith doubt of the Union's continued majority support among their employees (Pet. App. 42-43, 80-81, 86-87, 127).

Relying on its decision in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 N.L.R.B. 357 (1976), enforced, 584 F. 2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979), the Board held that petitioners' voluntary recognition of the Union established a presumption that the Union possessed the majority support of their employees, and that this presumption survived petitioners' withdrawal from the multi-employer bargaining unit (Pet. App. 42-43, 86-87). In light of this presumption, the Board concluded that petitioners were not entitled to withdraw recognition from the Union unless they could establish that the Union, in fact, no longer represented a majority of their employees or that petitioners had a reasonable doubt as to the Union's continuing majority status (*id.* at 71-72, 121). The Board determined that the evidence relied upon by petitioners to establish a reasonable doubt of majority status was insufficient to make either showing (*id.* at 72-81, 121-127).[1]

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[1]In asserting its doubt as to the Union's majority support, Barney's Club relied upon newspaper articles concerning organizing efforts to overcome low union membership and alleged financial difficulties in the Reno area, high turnover of unit employees, Union inactivity in representing employees, reports of employee dissatisfaction with the Union and Nevada's status as a right-to-work state. The Administrative Law Judge, "[a]fter considering all of the factors set forth above," concluded that Barney's Club "did not have substantial reasonable grounds for believing the Union had lost its majority status" (Pet. App. 80). He pointed out that the fact that "the Union was undergoing internal revisions does not indicate whether it continued to represent a majority" of Barney's Club employees (*id.* at 77). In addition, he observed that "a union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has" (*ibid*). He explained that Barney's Club's

The Board further found that the identical no-solicitation rules promulgated by Barney's Club and Sparks Nugget

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reliance on high employee turnover was misplaced because, under Board precedent, "new employees will be presumed to support a union in the same ratio as those they may replace" (*ibid.*). Concerning the contention that the Union filed no grievances, the Administrative Law Judge noted that union representatives visited the premises on a regular basis and that there was no evidence that the Union had any knowledge of any contract violations or had any cause to believe that grievances should be filed (*id.* at 79). Regarding purported employee dissatisfaction with the Union, the Administrative Law Judge observed that the evidence concerned only a few employees in a unit of approximately 40 employees and that such a small group "falls far short of establishing that a majority * * * expressed displeasure with the Union" (*id.* at 78). The subjective evaluations of supervisors, he added, could not reasonably be used as a basis for doubting the Union's continued majority support (*id.* at 78-79).

Barney's Club also sought to show that the Union in fact did not represent a majority of its employees, pointing out that the Union was having financial difficulties and had been placed in trusteeship, that a membership drive had commenced and that some employees had expressed dissatisfaction with the way the Union was being run. The Administrative Law Judge observed that it would be "sheer speculation to make an evaluation based on those facts as to the number of [Barney's Club] employees the Union actually represented" (Pet. App. 74). Accordingly, the Administrative Law Judge concluded that these "matters in themselves and when considered in connection with the matters * * * relating to [the employer's] claimed reasonable doubt as to the Union's majority fall short of establishing that the Union in fact did not represent a majority of [the employer's] employees" (*id.* at 74).

Sparks Nugget also relied on alleged Union financial difficulty and organizational activity, turnover, lack of grievance activity and reported employee dissatisfaction with the Union (Pet. App. 121-127). As to the latter, the Administrative Law Judge noted that the evidence consisted of hearsay reports by supervisors to Sparks' General Manager Carr after Carr had made clear to his supervisors that he was strongly opposed to the Union (*id.* at 124). The Administrative Law Judge also observed that "none of the supervisors was called to testify, and there is no probative evidence of any employee voicing a lack of support of the

were overly broad and consequently unlawful under the Act (Pet. App. 43 n.4, 50-54, 104-106). The Board relied (*id.* at 51) on the statement in this Court's decision in NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), that "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." The Board concluded that petitioners had failed to demonstrate that the rule prohibiting the employees from soliciting on the premises after their shift was necessary to maintain production or discipline (Pet. App. 52-54, 106). Accordingly, the Board held that petitioners violated Section 8(a)(1) of the Act by maintaining the no solicitation rules.

In addition, the Board found that Sparks Nugget's interrogation of employee Launius about her union activity violated Section 8(a)(1) of the Act. The Board noted that the supervisor who questioned Launius indicated his animosity to union organizing and threatened Launius with

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Union to any of said supervisors or to Carr" (*ibid.*). To be significant, the Judge concluded, "the evidence of dissatisfaction * * * must come from the employees themselves, not from the employer on their behalf" (*ibid.*).

In an effort to prove that the Union in fact no longer enjoyed majority support, Sparks Nugget sought to adduce testimony from Union Business Representative Lawrence as to whether there existed union business records demonstrating that the Union represented a majority of the unit employees. The Board rejected the proffered evidence. The Board reasoned that, since union membership was voluntary in the State of Nevada, record evidence concerning the extent of union membership would be irrelevant in determining whether a majority of employees desired union representation (Pet. App. 86). Sparks Nugget also sought to adduce testimony from a Board field examiner regarding his alleged statement to counsel for petitioners that the unfair labor practice charges were to be dismissed. The Board concluded that testimony on this subject by the field examiner fell within the evidentiary privilege protecting informal investigatory and trial preparation processes of regulatory agencies. Accordingly, the Board revoked the subpoena for the Board agent's testimony (*ibid.*).

reprisal if her union soliciting activity did not cease (Pet. App. 108). Finally the Board concluded that Sparks Nugget issued employee Dyer a reprimand because it "suspected Dyer of union activity" and wished "to deter him from continuing such activity" in violation of Section 8(a)(3) and (1) of the Act (*id.* at 109).

3. The court of appeals, relying on its prior decisions in *NLRB* v. *Tahoe Nugget, Inc.*, 584 F. 2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Sahara-Tahoe Corp.* v. *NLRB*, 581 F. 2d 767 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); *NLRB* v. *Sierra Development Co.*, 604 F. 2d 606 (9th Cir. 1979); and *NLRB* v. *Carda Hotels, Inc.*, 604 F. 2d 605 (9th Cir. 1979), upheld the Board's decisions and enforced its orders concerning the refusal-to-bargain violations (Pet. App. 1-34). The court noted that the evidence presented in the instant cases did not differ materially from that in *Tahoe Nugget* and *Sahara-Tahoe*, and concluded that there was substantial evidence to support the Board's finding that petitioners had failed to establish a good-faith doubt as to the Union's continuing majority status (Pet. App. 9-10). The court noted that in this case, as in *Tahoe Nugget* and *Sahara-Tahoe*, some evidence was presented by the employers of employee discontent, high turnover, low membership, financial difficulty and a vigorous union membership drive. Such evidence, the court concluded, "individually or cumulatively, presents only an equivocal inference of loss of majority support for the union" (Pet. App. 9-10).[2]

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[2]The court agreed with the Board that the evidence that petitioner Sparks Nugget sought to adduce from the Board field examiner (see note 1, *supra*) was protected by the privilege preserving the confidentiality of investigative files (Pet. App. 12). The court disagreed with the Board, however, concerning petitioners' efforts to prove actual loss of majority support through Union membership records. The court reasoned that "[u]nion membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant" (*id.* at 13; citations omitted). Nonetheless, the court concluded that the

The court of appeals also agreed with the Board's conclusion that the no-solicitation rules promulgated by petitioners were violative of Section 8(a)(1) of the Act (Pet. App. 16).[3] Finally, the court affirmed the Board's findings regarding the unlawful interrogation of employee Launius and reprimand of employee Dyer. The court concluded that as to both violations, the inferences drawn by the Board were reasonable and supported by substantial evidence on the record as a whole (*id.* at 23).

ARGUMENT

1. Petitioners' contentions regarding the refusal-to-bargain violations present the same issues that are presented in *Silver Spur Casino* v. *NLRB*, petition for cert. pending, No. 80-660 (filed Oct. 11, 1980), and that were previously before the Court in *Tahoe Nugget* and *Sahara-*

Board's ruling sustaining objections to the questioning of the Union business agent was not prejudicial. The court explained (Pet. App. 13-14; footnote omitted):

> The question asked by the respondents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees * * *.
>
> If the Union had answered the question affirmatively, the Union's position would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted. Therefore, we find no error that would require a reversal.

[3]The court, however, found that the Board's orders concerning the no-solicitation rules went too far. The court explained (Pet. App. 19):

> Since the [employers] could prohibit their employees from soliciting during nonworking hours in public areas of their premises, we modify the Board's order to read that the [employers] must cease and desist from:
>
> > "maintaining any rule or regulation prohibiting its employees from soliciting on its premises during nonworking hours in non-public areas of its premises."

Tahoe, supra. Certiorari was denied in *Tahoe Nugget* and *Sahara-Tahoe* and petitioners have presented no new arguments to justify a different result here. Petitioners do not dispute the settled principle that majority support is presumed to continue following certification or voluntary recognition and that, absent unusual circumstances, the presumption is irrebuttable for one year, and thereafter may be rebutted only if the employer shows that the union was actually in the majority or that the employer had a good-faith reasonable doubt of the union's continued majority support at the time of the refusal to bargain (Pet. App. 5-6). Instead, petitioners argue that the decision of the court of appeals that the presumption was not rebutted here conflicts with other court of appeals decisions. For the reasons stated below and in our Brief in Opposition to the petition in *Silver Spur Casino* (at 8-11), petitioners' contentions are unavailing.

a. Contrary to petitioners' suggestion (Pet. 6), the court of appeals did not acknowledge a conflict with the decisions of other circuits on the basic principles described above. Rather, the court stated (Pet. App. 15 n.9) that, of the numerous cases cited to it by petitioners, three "present factual situations in which other courts may have found the presumption of majority support rebutted upon similar or weaker evidence than presented in these cases." Those three cases are factually distinguishable from the present case. In *Ingress-Plastene, Inc.* v. *NLRB*, 430 F. 2d 542, 547 (7th Cir. 1970), and *Star Mfg. Co.* v. *NLRB*, 536 F. 2d 1192 (7th Cir. 1976) (and see 220 N.L.R.B. 582, 583 (1975) (dissenting opinion of then Chairman Murphy)), unlike here, the union had been derelict in its representational duties. In *W & W Steel Co.* v. *NLRB*, 599 F. 2d 934 (10th Cir. 1979), the union's majority at the Lubbock, Texas plant was based on a seven-plant election in which all ballots were commingled. Thus the union's majority at the single plant was never

established. Here, in contrast, the Union's majority presumption was not based on the fact that the Union had shown majority support in a multi-plant or multi-employer unit, but rather on the fact that each petitioner had voluntarily recognized the Union as the representative of its employees at the time it joined the multi-employer group (Pet. App. 7 n.6, 68-71, 119-121). Moreover, in denying enforcement of the Board's bargaining order, the Tenth Circuit relied upon the fact that a predecessor company to W & W Steel had operated the plant in question at the time of the Board election and W & W Steel took control without notice of the union's presence. 599 F. 2d at 938.

Petitioners' reliance (Pet. 10-11) on *NLRB* v. *Richard W. Kaase*, 346 F. 2d 24 (6th Cir. 1965), is similarly misplaced. In that case the union's position as majority representative stemmed from an election in a multi-employer unit. Thus, the union's majority among the Kaase employees had never been established as it was here by petitioners' voluntary recognition of the Union (Pet. App. 7 n.6). See *Tahoe Nugget, Inc.* v. *NLRB, supra*, 584 F. 2d at 303 n.36.

The only issue actually presented here is whether the court below correctly concluded that substantial evidence supports the Board's findings that petitioners did not have a good-faith doubt of the Union's majority support. Further review of that fact-bound issue is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[4]

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[4]Petitioners err in stating (Pet. 8) that the facts in *NLRB* v. *Alvin J. Bart & Co.*, 598 F. 2d 1267 (2d Cir. 1979), were "substantially" weaker than those here. In *Bart*, "three-fourths of the unit members signed [an] anti-union petition" (*id.* at 1272), a fact to which petitioners do not allude. Similarly, petitioners erroneously rely (Pet. 10) on *NLRB* v. *Randle-Eastern*, 584 F. 2d 720 (5th Cir. 1978), where the employer presented substantial unequivocal evidence which showed a lack of majority support. The court there acknowledged that it was a "close case" and, in finding the union's majority presumption rebutted, distinguished cases where, as here, "the [c]ompany's doubt was * * * based on 'speculative and subjective' evidence * * *." *Id.* at 729 (citations omitted).

b. Similarly, there is no merit to petitioners' assertion (Pet. 14-15) that they were barred from introducing evidence that would have demonstrated that the Union was actually lacking in majority support. As noted above (note 1, *supra*), the question asked by petitioners was whether the Union could produce any records that would demonstrate that the Union had the majority support of the employees. The court of appeals concluded (Pet. App. 13-14) that, even if the Union had answered the question in the negative, "that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption [of majority support] would not have been rebutted." The court's conclusion was plainly correct and, in any event, turns on the particular circumstances presented here.[5]

2. There is also no merit to petitioners' contention (Pet. 19-22) that Nevada's regulation of the gambling industry is a "special circumstance" that permits them to promulgate rules restricting employee solicitation on non-working time. Petitioners have failed to show how union solicitation by off-duty employees would violate either the spirit or the letter of Nevada's gaming laws or interfere with legitimate security interests.[6] The regulations cited in the petition (Pet. 22) merely concern work permits for "gaming employees" and a requirement that casinos exclude persons "of notorious or unsavory reputation" or convicted felons. Indeed,

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[5]Compare *Automated Business Systems* v. *NLRB*, 497 F. 2d 262 (6th Cir. 1974), cited by petitioners (Pet. 16), where the employer had sought to introduce affirmative evidence regarding the number of employees who had supported a decertification petition and expressed a desire not to be represented by the union.

[6]To the extent that petitioners' public service areas may justify a more restrictive no-solicitation rule, the court of appeals has already modified the Board's order to prohibit only rules banning solicitation during non-working hours in nonpublic areas (see note 3, *supra*).

under Nevada law, "gaming employee" is defined as specifically excluding "bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages" (Nev. Rev. Stat. § 463.335 (1979))—the very group of employees who are represented by the Union and are the subject of the instant litigation (Pet. App. 46, 57-58, 101). Thus, even assuming that it might be appropriate for the Board to engage in balancing or consideration of alternate means of employee communication upon an employer's making a "creditable showing of special, justifying circumstances" for a broad no-solicitation rule (*McDonnell Douglas Corp.* v. *NLRB*, 472 F. 2d 539, 545 (8th Cir. 1972)),[7] no such showing was made here. Accordingly, "this is not the occasion to balance the availability of alternative channels of communication against a legitimate employer business justification for barring * * * communications" during non-working hours in nonpublic areas of the employers' premises. *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 326 (1974).[8]

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[7]But see *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 505 (1978) ("outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry * * *").

[8]Petitioners also contend (Pet. 27-28 n.7) that the Board erred in finding that the interrogation of Launius was coercive. The Board's finding, however, was amply supported by evidence of expressed union hostility plus "a threat of discharge for any 'further' violation of the company's no-solicitation rule * * *" (Pet. App. 22-23, 104-105, 108). Finally, petitioners challenge (Pet. 28 n.7) the finding that employee Dyer's reprimand was unlawfully motivated. But the Board's findings were based on substantial and essentially uncontradicted evidence and were thus properly affirmed (Pet. App. 23, 107-108, 109).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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